

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

March 26, 2010

Ronald J. Peterson
150 95th Street, Apt. 6C
Brooklyn, New York 11209

Philip T. Edwards, Esquire
Murphy & Landon
1011 Centre Road, #210
Wilmington, DE 19805

RE: Ronald Peterson v. Richard Proska
C.A.No. S09C-08-007-ESB
Letter Opinion

Date Submitted: January 7, 2010

Dear Messrs. Peterson and Edwards:

This is my decision on Defendant Richard Proska's Motion for Summary Judgment in this case involving an alleged verbal assault by Proska against Plaintiff Ronald Peterson.

STATEMENT OF FACTS

This case arose out of the attack by one of Peterson's German Shepards on Proska's wife. Peterson and Proska lived near each other at the time of this incident. Peterson owned two German Shepards named Roxie and Heidi. One day one of Peterson's dogs got away from him and ended up on Proska's property, where it cornered Proska's wife in the driveway, causing her considerable alarm and fright. Proska then verbally confronted Peterson about the incident. Peterson filed a complaint against Proska alleging that as a result of the verbal confrontation he now suffers from elevated blood pressure, anxiety, a loss of sleep, an inability to focus, and a loss of income based upon

his inability to work because of his physical and psychological problems. Peterson also alleges that he gave away Roxie as a result of this incident. He seeks \$2100 in compensation for the purchase price of Roxie and related veterinarian, cargo and shipping bills. Proska has filed a Motion for a Summary Judgment, arguing that judgment should be entered in his favor on Peterson's personal injury claims because he has not identified an expert who will relate his alleged problems to the verbal confrontation. Proska also argues that judgment should be entered in his favor on Roxie's bills because they have nothing to do with the verbal confrontation.

STANDARD OF REVIEW

This Court will grant summary judgment only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact.¹ Once the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.² The Court views the evidence in a light most favorable to the nonmoving party.³ Where the moving party produces an affidavit or other evidence sufficient under *Superior Court Civil Rule 56* in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.⁴ If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an

¹ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

² *Id.* at 681.

³ *Id.* at 680.

⁴ *Super. Ct. Civ. R. 56(e)*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

essential element of the case, then summary judgment must be granted.⁵ If, however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is not appropriate.⁶

DISCUSSION

Peterson alleges that Proska's verbal assault caused him to suffer from elevated blood pressure, anxiety, a loss of sleep, an inability to focus, and a loss of income based upon his inability to work because of his physical and psychological problems. Peterson has the burden of proving a *prima facie* case against Proska before it can go to the jury.⁷ Peterson will have to prove as a part of his *prima facie* case that Proska's verbal assault proximately caused his alleged injuries. It is well-established that "[w]hen the issue of proximate cause is presented in a context which is not a matter of common knowledge, expert testimony may provide a sufficient basis for a finding of causation, but in the absence of such testimony, it may not be made."⁸ "With a claim for bodily injuries, the causal connection between the defendant's alleged negligent conduct and the plaintiff's alleged injury must be proven by the direct testimony of a competent medical expert."⁹ A

⁵ *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. den.*, 112 S.Ct. 1946 (1992); *Celotex Corp.*, 477 U.S. 317 (1986).

⁶ *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

⁷ *Ebersole v. Lowengrub*, 208 A.2d 495 (Del. 1965).

⁸ *Sluss v. Davis*, 2006 WL 2846387, at *2 (Del. Super. Oct. 4, 2006).

⁹ *Rayfield v. Power*, 840 A.2d 642 (Del. 2003).

jury cannot assess a plaintiff's psychological condition based only on his self-description."¹⁰ It is clear, given the nature of Peterson's alleged injuries, that he will need an expert to establish causation.

The deadline for Peterson to identify an expert witness was November 12, 2009. Peterson failed to identify an expert witness. In Peterson's response to Proska's Motion for Summary Judgment he stated that he had retained an expert to testify on his behalf. However, Peterson did not seek the Court's approval to modify the scheduling order to give him more time to identify an expert. Given the procedural posture of the case, it is now simply too late to give Peterson more time now to do what he should have done a long time ago. Without expert testimony, Peterson can not make out a *prima facie* case against Proska because it is not within the common knowledge of the jury to determine if Proska's verbal assault caused Peterson's alleged physical and psychological injuries. Proska's Motion for Summary Judgment on this allegation must be granted.

Peterson also alleges that he suffered \$2100 in damages related to Roxie. Peterson paid \$1000 for Roxie and incurred \$1100 in other expenses to bring Roxie from California to Delaware. Peterson incurred these expenses before the verbal confrontation with Proska. He gave Roxie away after the verbal confrontation with Proska because he was afraid that if she got out again that the animal control officials would catch her and euthanize her. However, it is not Proska's responsibility to control Roxie.¹¹ That responsibility rests solely with Peterson. Thus, Peterson's decision to give Roxie away is

¹⁰ *Cummings v. New Castle County*, 2003 WL 2008211, at *2 (Del. Super. April 30, 2003).

¹¹ 7 Del.C. § 1705.

wholly unrelated to the verbal confrontation with Proska. Proska's Motion for Summary Judgment on this allegation must be granted as well.

CONCLUSION

Defendant Richard Proska's Motion for Summary Judgment is granted.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley